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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 481

BENNY LURK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The Court of Appeals for the District of Columbia Circuit rendered an opinion (R. 38) and a judgment (R. 42) on June 22, 1961. The opinion has not yet been officially reported. On July 17, 1961, Circuit Judge Prettyman filed a concurring opinion (R. 43), also not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 22, 1961 (R. 42), and the petition for a writ of certiorari was filed on July 21, 1961. The petition, together with the motion for leave to proceed *in forma pauperis,* was

granted on October 9, 1961. 368 U.S. 815; R. 50. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. Whether any provision of the Constitution of the United States permits the assignment, pursuant to 28 U.S.C. §294(d), of a judge who retired from the Court of Customs and Patent Appeals prior to 1958 to sit on the United States District Court for the District of Columbia as the presiding judge at petitioner's criminal trial.

2. Whether, if the assignment of a retired or active judge of the Court of Customs and Patent Appeals to preside over a criminal trial in a federal district court located in any of the various states of the union be deemed unconstitutional, the constitutional power of Congress to legislate for the District of Columbia nevertheless authorizes the assignment of such a judge to preside over a criminal trial in the federal district court in the District of Columbia.

Constitutional and Statutory Provisions Involved

Constitution of the United States, Article I, Sec. 8, Cl. 17:

> The Congress shall have power . . .
>
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall

be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . .

Constitution of the United States, Article III:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

* * * * *

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28 U.S.C. §211, as amended in 1958:

§211. Appointment and number of judges

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals. Such court is hereby declared to be a court established under article III of the Constitution of the United States.

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28 U.S.C. §293(a), as amended:

§293. Judges of other courts

(a) The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals to serve, respectively, as a judge of the Court of Customs and Patent Appeals or the Court of Claims upon presentation of a certificate of necessity by the chief judge of the court wherein the need arises, or to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

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28 U.S.C. §294(d), as amended:

§294. Assignment of retired Justices or judges to active duty

(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court.

Statement of the Case

(1) *The history of this litigation*

This case is here for the second time. It now comes before this Court following consideration last term of the case at an earlier juncture and a remand to the Court of Appeals for a hearing on the merits of petitioner's appeal from his conviction. *Lurk* v. *United States,* 366 U.S. 712. The briefs

and record in the proceeding last term, No. 669, Oct. Term 1960, give the full background of this case.[1]

Petitioner was tried and found guilty of the crime of robbery, as defined in 22 D.C. Code §2901, in the District Court for the District of Columbia.[2] Presiding over that trial was Judge Joseph R. Jackson, a retired judge of the Court of Customs and Patent Appeals. He had been appointed to that court in 1937 and retired therefrom in 1952. By order of the Chief Justice of the United States, acting pursuant to 28 U.S.C. §294(d), Judge Jackson was assigned to serve as a judge of the District Court for the District of Columbia during the year 1960. Petitioner's trial took place on March 22, 1960.

Following his trial and conviction, petitioner sought to prosecute an appeal *in forma pauperis*. Judge Jackson denied this request. Petitioner then renewed the effort in the Court of Appeals. At that point the undersigned counsel was appointed to represent the petitioner and to file a memorandum in support of the request. In that memorandum, counsel suggested that one non-frivolous issue justifying the grant of leave to appeal involved the constitutionality of Judge Jackson's assignment to the District Court. But the Court of Appeals summarily denied leave to appeal *in forma pauperis*.

This Court granted certiorari to review the action of the Court of Appeals. *Lurk* v. *United States*, 365 U.S. 802.

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[1] By order of this Court, 368 U.S. 815, petitioner has been granted leave to use the record in No. 669 in connection with the instant case. That record has been reprinted as part of the record in this case, No. 481, Oct. Term 1961, and appears at R. 1-35.

[2] Petitioner was charged with having stolen from one Charles C. Edgeworth certain property, including cash, of the value of about $58.31. Following conviction by a jury, petitioner was sentenced by Judge Jackson to a prison term of not less than 4 years and 9 months and of not more than 14 years and 3 months. R. 18.

The issue as to the constitutionality of the assignment was fully briefed and argued by the parties on the chance that this Court, should it conclude that the court below erred in denying leave to appeal, might deem it appropriate to resolve the merits of this constitutional issue rather than to remand the matter for consideration by the Court of Appeals. A majority of this Court, however, simply reversed the judgment of the Court of Appeals and remanded the case to that court, citing *Ellis* v. *United States,* 356 U.S. 674. Three Justices dissented, believing that the constitutional issue should be decided by the Court then and there and that the lower court's views on the matter could be of no effective assistance to this Court. *Lurk* v. *United States,* 366 U.S. 712 (May 29, 1961).

The issuance of this Court's judgment of reversal was expedited by agreement of the parties. On June 7, 1961, just nine days after the entry of that judgment, the panel of the Court of Appeals that had originally denied petitioner leave to appeal entered an order granting such leave in light of this Court's action. Simultaneously, the Court of Appeals *sua sponte* ordered that the case be "set for hearing before the court *en banc* at 10:00 a.m. June 20, 1961, on the basis of the briefs and appendix filed in the Supreme Court in *Lurk* v. *United States,* No. 669, October Term, 1960, which briefs and appendix are incorporated in this case by reference." R. 37. The parties were also allowed to file supplemental briefs in mimeographed form. The judges of both the Court of Claims and the Court of Customs and Patent Appeals were permitted to appear *amicus curiae* and to participate through counsel in the oral argument.

Oral argument took place as scheduled on June 20, 1961, before the court *en banc,* Circuit Judge Fahy not participating. Two days later, June 22, 1961, the Court of Appeals

issued a *per curiam* opinion affirming the conviction. R. 38-41. As a premise to its discussion of the constitutionality of Judge Jackson's assignment, the court stated that its duty was "to dispose of the case with as complete an avoidance as may be of constitutional questions." It merely noted the basic issue as to the constitutionality of assigning a retired legislative court judge to sit on and perform the Article III functions of a constitutional court. The court purported not to answer that issue by ruling that the assignment of Judge Jackson "must in any event be sustained under the plenary power of Congress over the District of Columbia and its courts, pursuant to Article I, Sec. 8, Cl. 17, of the Constitution."

Pointing to the fact that at all relevant times legislation has existed specifically authorizing the assignment of judges of the Court of Customs and Patent Appeals to meet the needs of the District Court for the District of Columbia,[3] the court concluded that "there can be no doubt of the power of Congress to do so, in view of the broad sweep of its legislative authority over the Federal District." The court also made plain its view that such authority permitted a judge so assigned to exercise "every type of jurisdiction possessed by" the District Court for the District of Columbia.[4]

On July 17, 1961, Circuit Judge Prettyman filed a concurring statement which reviewed past assignments of

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[3] Petitioner has never contested the existence or purported thrust of such legislation. Nor has there been any dispute over the fact that, as detailed in Circuit Judge Prettyman's opinion, numerous assignments have been made over the years of judges of the Court of Customs and Patent Appeals to sit on the District Court.

[4] The Court of Appeals further held that the other issue raised on petitioner's behalf—relative to the trial references to petitioner's earlier prison record—was without merit. That issue is not renewed before this Court.

judges of the Court of Customs and Patent Appeals to the District Court for the District of Columbia and concluded that the designation of Judge Jackson to sit on the District Court and to preside over this case "is nothing new." R. 43-49.

On October 9, 1961, this Court granted the motion for leave to proceed *in forma pauperis* and the petition for certiorari. 368 U.S. 815. Simultaneously, the Court granted the petition for certiorari in No. 242, *Glidden Co.* v. *Zdanok*, limited to the question as to whether the participation by a Court of Claims judge in a proceeding in the Court of Appeals for the Second Circuit vitiates the judgment of the Court of Appeals. 368 U.S. 814.

(2) *The facts as to Judge Jackson*

As a backdrop to a consideration of the constitutional issue in this case, certain uncontroverted facts as to Judge Jackson's appointment to and resignation from the Court of Customs and Patent Appeals and as to his assignment to the District Court below must be understood.

Judge Jackson was nominated by the President and confirmed by the Senate as a judge of the Court of Customs and Patent Appeals in 1937 and entered upon his duties on that court on December 15, 1937.[5] His commission, a copy of which was supplied to the court below by counsel for the *amicus* judges of the Court of Customs and Patent Appeals, reads as follows:

---

[5] Judge Jackson is listed in 92 F.2d XI as having been "appointed" to the Court of Customs and Patent Appeals on December 14, 1937. But according to the records of that court, he took the oath of office and entered upon his duties on December 15, 1937. As indicated above, his commission was signed by the President on December 14, 1937.

FRANKLIN D. ROOSEVELT

President of the United States of America

To all who shall see these Presents Greeting:

Know Ye; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Joseph R. Jackson, of New York, I have nominated, and, by and with the advice and consent of the Senate, do appoint him an Associate Judge, U. S. Court of Customs and Patent Appeals, and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Joseph R. Jackson, during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed,

Done at the City of Washington this fourteenth day of December, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the United States of America the one hundred and sixty-second.

/s/ Franklin D. Roosevelt

By the President:

/s/ Homer Cummings
Attorney General

He retired from the Court of Customs and Patent Appeals as of April 1, 1952. See 193 F.2d XV.

At various times thereafter, and more particularly during the entire year of 1960 (during which petitioner's trial took place before him), Judge Jackson was assigned by the Chief Justice of the United States to serve as a District Judge of the United States District Court for the District of Columbia. The assignment in question, a copy of which was filed in the office of the Clerk of the District Court on December 8, 1959, reads as follows:

> DESIGNATION OF A RETIRED JUDGE OF THE COURT OF CUSTOMS AND PATENT APPEALS TO SERVE AS A DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
>
> The Chief Judge of the United States Court of Appeals for the District of Columbia Circuit having certified that there is a necessity for the designation and assignment of a retired judge on the Roster of Senior Judges to serve as a district judge of the United States District Court for the District of Columbia during the period beginning January 1, 1960, and ending December 31, 1960; and the Honorable Joseph R. Jackson, Retired Judge of the Court of Customs and Patent Appeals, whose name appears upon the Roster of Senior Judges as available for duty from time to time in the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia, having expressed his willingness to undertake the performance of such judicial duties beginning January 1, 1960, and ending December 31, 1960;
>
> NOW, THEREFORE, pursuant to the authority vested in me by Title 28, United States Code, Sec. 294(d), I do hereby designate and assign the Honorable Joseph R. Jackson to serve as a district judge of the United

States District Court for the District of Columbia and discharge the official duties thereof beginning January 1, 1960, and ending December 31, 1960, and for such further time as may be required to complete unfinished business.

/s/ Earl Warren
Chief Justice of the
United States

Dated: Dec. 7, 1959

A similar designation of Judge Jackson to serve as a judge of the District Court from January 1 to December 31, 1961, has been signed by the Chief Justice and filed in the District Court.

Summary of Argument

1. At the heart of the constitutional issue in this case is the historic doctrine of separation of governmental powers. As part of that doctrine, it is essential that those possessed of legislative power not be allowed to exercise the power and function given to the judicial branch of government. Growing out of this doctrine is the issue in this case—whether the judicial power of the United States may, by assignment, be exercised by an individual invested only with legislative powers as expressed in a legislative tribunal.

2. Article III tribunals, often called constitutional courts, are those judicial bodies established by or pursuant to Article III of the Constitution. For all practical purposes, they consist of the Supreme Court of the United States, the eleven courts of appeals, and the various district courts. The power that they exercise is the judicial power of the United States, the power to adjudicate "Cases" and "Con-

troversies" detailed in Section 2 of Article III. While it is for Congress to say how much of, and on what conditions, this judicial power shall be exercised, Congress cannot compel these courts to adjudicate any matter not classified as a case or controversy. Nor can Congress call upon those courts to perform any legislative, administrative or executive functions.

Article III courts have much freedom in exercising their power. To implement that freedom, Article III, Section 1, provides that judges of these courts shall hold office during good behavior and that their compensation shall not be diminished while in office. In exercising their power as activated by Congress, these courts have at their disposal all the procedural and substantive devices associated with our federal courts—including the Federal Rules of Civil and Criminal Procedure and the jury trial techniques.

3. Of an entirely different constitutional origin are those tribunals that have been denominated Article I or legislative in nature. These courts are invariably established by Congress to help carry out some specific function or power of the Federal Government, such as the power to lay duties on imports or to pay the debts of the United States.

As stated by Chief Justice Marshall in *American Insurance Co.* v. *Canter,* 1 Pet. 511, 546, these legislative courts "are incapable of receiving" the judicial power exercisable by Article III tribunals. Hence they may be given a variety of functions by Congress, not being limited to those judicial in nature. They sometimes perform legislative and administrative duties and render advisory opinions. And they may also be given jurisdiction to decide cases and controversies involving individuals and the Government, matters which are also cognizable by Article III courts. The fact that a legislative court has some of the same type of juris-

diction as possessed by Article III courts, however, does not render it an Article III court itself. It merely reflects the freedom which Congress has with respect to legislative tribunals.

What remains critical as to legislative courts is that they are established to help implement a special or particular power of Congress, rather than to execute the broad range of judicial power specified in Article III. In a real sense, therefore, a legislative court judge has no greater constitutional status than an administrative or executive officer of the Government. His tenure and his compensation are subject to the wishes of Congress. And he receives no rights or powers from Article III of the Constitution. His function is limited to adjudicating matters within the narrow range of the particular power of Congress with respect to which the court on which he sits was created. He does not have the broad procedural and substantive devices possessed by Article III judges to help resolve these matters.

4. The District Court for the District of Columbia has been found to be an Article III tribunal, capable of exercising the judicial power of the United States. *O'Donoghue* v. *United States,* 289 U.S. 516. Its judges are entitled to the protections of Article III, Section 1. In addition, certain administrative or non-judicial functions may also be given to this court, by virtue of the plenary power of Congress over the District of Columbia. Art. I, Sec. 8, Cl. 17. But the possession of such non-judicial powers does not make it any less an Article III tribunal. There is no incompatibility between Article III and Article I, Section 8, Clause 17.

The view of the court below that Article I, Section 8, Clause 17 alone justified the assignment of a legislative

court judge to perform the Article III functions of the District Court for the District of Columbia is unwarranted. Since Article III is applicable to this situation, such an assignment must be tested by the principles growing out of Article III.

Certainly a criminal trial involves the exercise of the District Court's Article III judicial power. The fact that the crime is one outlawed by the District of Columbia Code rather than by Title 18 of the United States Code does not make the process of adjudication any less judicial or Article III in nature. The legislative functions of this court relate to far different matters—administrative matters, probate and divorce jurisdiction, and appointment of the school board. A criminal trial, however, is of the very essence of the judicial function. Here Congress has called upon the District Court to exercise that judicial function to help execute its power with respect to the District of Columbia. It has done so in the same way as it has called on this and other federal district courts to exercise their judicial function to help execute its power with respect to interstate commerce, bankruptcy, etc.

5. The Court of Customs and Patent Appeals has been found to be a tribunal of a legislative or Article I nature. *Ex parte Bakelite Corp.*, 279 U.S. 438; *Williams* v. *United States*, 289 U.S. 553, 571. It is simply a tribunal designed to implement the narrow Congressional power to lay and collect duties on imports and is not designed to execute the gamut of the judicial power of the United States as possessed by federal district courts and federal courts of appeals. Congress at the start recognized that it was really creating an administrative board rather than an Article III court, and its subsequent treatment of the tribunal has confirmed that recognition. Thus Congress cut the salaries of the judges of this court in 1932, and only in 1930 did it

provide life tenure for the judges. Many of the powers of this court, such as those involving patent and trademark appeals, have always been considered non-reviewable administrative rulings.

6. The 1958 effort by Congress to designate the Court of Customs and Patent Appeals as a court established under Article III was totally ineffective. As the *Bakelite* case determined, the expressed intention of Congress is not decisive; rather, the decisive element is the constitutional power exercised in the establishment of the court. Here nothing has happened to change the *Bakelite* conclusion that the court was established to implement Article I power over import duties. The 1958 legislation was expressly premised on a continuation of the same powers and jurisdiction of the court; hence it was meaningless.

7. Since a judge can acquire no greater powers than the court to which he is appointed, Judge Jackson cannot be considered ever to have acquired any but legislative powers by virtue of his appointment to and service on the Court of Customs and Patent Appeals. And when he retired from that court, he took with him only the legislative powers he had acquired. At no time has he ever been eligible for, or capable of receiving, Article III judicial power. For that reason, therefore, any attempt by Congress to authorize his assignment to an Article III tribunal so as to exercise Article III judicial power must be considered invalid. Such an attempt negates the basic doctrine of separation of powers.

8. Any other conclusion would create a host of problems. Moreover, any difficulties stemming from an invalidation of this assignment can be met when and if they arise. The doctrine of separation of powers is too important to be disregarded for slight reasons.

9. Petitioner's trial in the District Court before a judge who lacked constitutional authority to exercise Article III power involved a denial of due process of law. See *Donegan* v. *Dyson,* 269 U.S. 49, 54-5.

ARGUMENT

1.

The General Nature of the Constitutional Issue.

At the heart of the constitutional issue in this case is the historic doctrine of separation of governmental powers into three grand departments of the executive, the legislative and the judicial. "This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer* v. *Philippine Islands,* 277 U.S. 189, 201, namely, to preclude a commingling of these essentially different powers of government in the same hands." *O'Donoghue* v. *United States,* 289 U.S. 516, 530.

Critical to the successful working of this triadic form of government is the insistence "that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." *Kilbourn* v. *Thompson,* 103 U.S. 168, 191. Thus those entrusted with legislative power have consistently been held incapable of performing the law enforcement functions of the executive department or the adjudicatory functions of the judicial branch. See *Watkins* v. *United States,* 354 U.S. 178, 187. Likewise, jurisdiction to exercise the judicial power of the United States expressed in Article III of the Constitution cannot be conferred on any executive officer or administrative or execu-

tive branch, or on any judicial tribunal other than one established under Article III. *Williams* v. *United States,* 289 U.S. 553, 578. And, by the same token, the federal courts cannot exercise or participate in "functions which are essentially legislative or administrative." *Federal Radio Commission* v. *General Electric Co.,* 281 U.S. 464, 469, and cases cited; *United Steelworkers of America* v. *United States,* 361 U.S. 39, 43.

There is, of course, no absolute or universal formula for determining in all cases the lines of demarcation between the various governmental functions. The science of government being an intensely practical one, many fluctuating and vague lines have been established. And, particularly with respect to legislative power, delegations of functions have frequently been validated. But of all the powers of government, the judicial power is the most ascertainable, the most clearly defined, and the least delegable. And it is within the finite realm of judicial power, as defined in Article III of the Constitution, that we find the constitutional question posed by this case.

That question is both narrow and significant. Stated in most elemental terms, the question is whether the judicial power of the United States may, by assignment, be exercised by an individual invested only with legislative or Article I powers. There is here no problem of delegation, or of the exercise of administrative or quasi-judicial power. What must be decided is whether matters which are of the traditional concern of federal courts—matters denominated as "Cases" or "Controversies" by Article III—can be adjudicated and resolved by any individual or judge other than one nominated and confirmed as a member of an Article III tribunal. In this very basic sense, this question goes to the core of the separation of powers concept.

2.

The Nature of Article III Tribunals.

More specifically, this case brings into focus the constitutional significance of the differences between Article III and Article I tribunals, and the judges performing the respective functions thereof.

Article III tribunals, sometimes called constitutional courts, are those judicial bodies established by or pursuant to Article III of the Constitution. They consist of the Supreme Court of the United States and "such inferior Courts as the Congress may from time to time ordain and establish." Art. III, Sec. 1. And the power that they exercise is the judicial power of the United States, the power to adjudicate and resolve the "Cases" and "Controversies" detailed in Section 2 of Article III.[6] This includes the power "to try cases and controversies between individuals and between individuals and the Government" and the "trial of criminal cases." *Toth* v. *Quarles,* 350 U.S. 11, 15.

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[6] As stated by Mr. Justice Frankfurter, concurring in *United Steelworkers of America* v. *United States,* 361 U.S. 39, 60:

> "What proceedings are 'Cases' and 'Controversies' and thus within the 'judicial Power' is to be determined, at the least, by what proceedings were recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial systems. Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters such as were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies'."

See also concurring opinion of Mr. Justice Frankfurter in *Youngstown Co.* v. *Sawyer,* 343 U.S. 579, 594.

It is for Congress to say, of course, how much of and on what conditions this judicial power of the United States shall be exercised by Article III tribunals. Congress can qualify, extend or withhold the jurisdiction of these courts as it sees fit. *Lockerty* v. *Phillips,* 319 U.S. 182, 187, and cases cited. "The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law." *Cary* v. *Curtis,* 3 How. 236, 245.

But while Congress can freely limit and apportion the exercise of the judicial power of the United States, it cannot authorize or compel Article III tribunals to accept jurisdiction over matters going beyond the justiciable "Cases" and "Controversies" set forth in Article III.[7] From the earliest days to the present, this Court has rejected all efforts to impose on these tribunals powers which by their nature are legislative, executive or administrative. *Hayburn's Case,* 2 Dall. 409; *United States* v. *Yale Todd,* reported in footnote to *United States* v. *Ferreira,* 13 How. 40, 52; *Keller* v. *Potomac Electric Power Co.,* 261 U.S. 428, 440-3; *United Steelworkers of America* v. *United States,* 361 U.S. 39, 43. Such courts cannot render advisory opinions. *Muskrat* v. *United States,* 219 U.S. 346; *In re Summers,* 325 U.S. 561. And their judgments cannot be subject to legislative or executive revision. *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716; *Gordon* v. *United States,* 2 Wall. 561. Thus Congress may legislate as to the authority and jurisdiction of Article III tribunals only within the Article III boundaries of judicial power.

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[7] Constitutional courts established under Section 2 of Article III "share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, . . . with no power in Congress to provide otherwise." *Ex parte Bakelite Corp.,* 279 U.S. 438, 449.

Moreover, to the extent that a case or controversy requires the exercise of the judicial power defined by Article III, "jurisdiction thereof can be conferred only on courts established in virtue of that article, and . . . Congress is without power to vest *that* judicial power in any other judicial tribunal, or, of course, in an executive officer, or administrative or executive board, since to repeat the language of Chief Justice Marshall in *American Ins. Co.* v. *Canter,* 1 Pet. 511, 'they are incapable of receiving it'." *Williams* v. *United States,* 289 U.S. 553, 578. And see *Ex parte Randolph,* 2 Brock. 447, Fed. Cas. No. 11,558 (Chief Justice Marshall, sitting on the circuit). Confining Article III controversies to Article III tribunals reflects the fact that only these bodies have all the legal facilities appropriate to resolving such matters. The judicial power of the United States is not merely the power to enforce some mandate or authority of Congress; it is the power to adjudicate a case or controversy in light of all relevant considerations—including, but not necessarily limited to, Congressional mandates. Within the lawful scope of its jurisdiction, an Article III court can exercise this power in any way it deems appropriate. Such freedom is shared by no other courts in the federal system.

To implement this independence of action in the exercise of Article III judicial power, Section 1 of Article III provides that the judges of constitutional courts "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." This is a *constitutional* life tenure and a *constitutional* protection against salary diminutions—constitutional provisions which are applicable only to judges of Article III courts. Such provisions "were designed to give judges maximum freedom from possible coercion or influence by the

executive or legislative branches of the Government." *Toth* v. *Quarles,* 350 U.S. 11, 16.

How, then, are these Article III courts to be identified, these courts that are subject to Congressional directions only within the metes and bounds of Article III? For all practical purposes, they consist of the various United States District Courts, the eleven United States Courts of Appeals and the Supreme Court of the United States—and none other. Those are the only courts that perform all the varied functions prescribed by the Judicial Code and the Criminal Code of the United States, either at the trial or appellate level. Those are the only courts that are completely free to draw upon all relevant legal, statutory and equitable considerations in resolving a case or controversy, including the procedural arsenals of the Federal Rules of Civil and Criminal Procedure. Those are the only tribunals with whom is integrated the jury trial system for the determination of facts, liability or guilt. They alone can act freely "as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property." *Toth* v. *Quarles,* 350 U.S. 11, 17. And those are the only courts which have been held constitutionally incapable of performing administrative, legislative or executive functions.

At the base of the pyramid of Article III courts are the United States District Courts. At least one has been established within each state and the District of Columbia. 28 U.S.C. §§81-131. And when the term "District Court of the United States" has been used in statutes and rules, it has uniformly been interpreted to have its "historic significance" of describing "the constitutional courts created under Article 3 of the Constitution." *Mookini* v. *United States,* 303 U.S. 201, 205. As stated in *Longshoremen* v. *Juneau Spruce Corp.,* 342 U.S. 237, 241, "The words 'district

court of the United States' commonly describe constitutional courts created under Article III of the Constitution, not the legislative courts which have long been the courts of the Territories." [8]

All of the judgments of District Courts, reflecting as they do the exercise of Article III power only, are reviewable on appeal by the Courts of Appeals and by this Court. The constitutional or Article III status of the Courts of Appeals and of this Court is beyond question.

Such, then, is the general outline of the courts established under Article III in order to implement the judicial power of the United States as directed by Congress. The salient features are (1) jurisdiction, as prescribed by Congress, within the limits of the justiciable "Cases" and "Controversies" prescribed in Section 2 of Article III, (2) complete, independent freedom of action in resolving such "Cases" and "Controversies", (3) utilization of all civil and criminal trial procedures, including integrated jury processes, and (4) judges whose tenure and insulation from compensation diminutions stem directly from Article III, Section 1.

3.

The Nature of Article I Tribunals.

Of an entirely different constitutional origin are those tribunals that have been denominated Article I or legislative in nature. The genesis of the distinction between legislative and constitutional courts is to be found in the opinion of Chief Justice Marshall in *American Insurance Co.* v. *Canter,* 1 Pet. 511, 546, rendered in 1828. There the status and jurisdiction of courts created by Congress for

[8] Footnote 4 of the *Longshoremen* opinion, 342 U.S. at 241, made specific note of the creation in the 1948 Judicial Code, 28 U.S.C. §88, of a judicial district for the District of Columbia.

the then Territory of Florida were drawn into question. And there the Chief Justice concluded that such courts, being composed of judges holding office for four year terms,

> "... are not constitutional Courts, in which the judicial power conferred by the constitution on the general government, can be deposited. *They are incapable of receiving it.* They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States." [Emphasis added.]

The concept of legislative courts was further developed by Justice Van Devanter, writing for a unanimous Court in *Ex parte Bakelite Corp.*, 279 U.S. 438, 449:

> "While article 3 of the Constitution declares, in §1, that the judicial power of the United States shall be vested in one Supreme Court and in 'such inferior courts as the Congress may from time to time ordain and establish,' and prescribes, in §2, that this power shall extend to cases and controversies of certain enumerated classes, it long has been settled that article 3 does not express the full authority of Congress to create courts, and that other articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes

of courts. Those established under the specific power given in §2 of article 3 are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of §2 of article 3; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior."

The constitutional characteristic of a legislative court is that it represents the exercise of some power of Congress other than the invocation of Article III judicial power. In other words, as the *Bakelite* case indicates, Article III does not express the full authority of Congress to create courts or to clothe them with judicial functions. Many of the provisions of Section 8 of Article I, specifying the powers of Congress, create authority for the establishment of special courts to assist solely in the execution of those powers. Other Articles of the Constitution may also give rise to such specialized tribunals.

Among the historical examples of the establishment of these specialized legislative tribunals are the following:

(1) The Court of Private Land Claims, created in 1891 (26 Stat. 854), by virtue of Congressional power over the fulfillment of stipulations in the Treaty of Guadalupe-Hidalgo and the Gadsden Treaty concluded with Mexico in 1848 and 1853. This court heard and determined land claims against the United States, having taken over that

function from Congress itself. See *Coe* v. *United States*, 155 U.S. 76; *Ex parte Bakelite Corp.*, 279 U.S. 438, 456.

(2) The Choctaw and Chickasaw Citizenship Court, created in 1902 (32 Stat. 641) to hear and determine controverted claims regarding membership in these two Indian tribes. The establishment of this court reflected the plenary power of Congress over Indian tribes that were under the guardianship of the United States. See *Wallace* v. *Adams*, 204 U.S. 415; *Ex parte Bakelite Corp., supra*, 457.

(3) Consular courts, described as "legislative courts created as a means of carrying into effect powers conferred by the Constitution respecting treaties and commerce with foreign countries." *Ex parte Bakelite Corp., supra*, 451.

(4) United States Court for China, established in 1906 (34 Stat. 814) to exercise over American citizens the extraterritorial jurisdiction earlier conceded by China in a treaty with the United States. It thus represented a means of effectuating Congressional power under the Constitution respecting treaties and commerce with foreign nations.

(5) Territorial courts, deriving from the power of Congress over the territories and possessions of the United States. These are generally denominated legislative courts and the judges thereof serve only for limited terms. See *American Insurance Co.* v. *Canter*, 1 Pet. 511, 546.

(6) The Court of Claims, established in 1855 (10 Stat. 612) for the investigation and resolution of claims against the United States. Such a function, this Court has declared, "belongs primarily to Congress as an incident of its power to pay the debts of the United States" and is "susceptible of legislative or executive determination." *Ex parte Bake-*

lite Corp., supra, 452-3; *Williams* v. *United States,* 289 U.S. 553, 568-571; *United States* v. *Sherwood,* 312 U.S. 584, 587.

(7) The Court of Customs and Patent Appeals, established in 1909 (36 Stat. 11, 105) by virtue of Congressional power "to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution, . . . the determination of which [matters] may be, and at times has been, committed exclusively to executive officers." *Ex parte Bakelite Corp., supra,* 458.

(8) The Customs Court, derived from the same power of Congress as was invoked in creating the Court of Customs and Patent Appeals. *Ibid.*

All of these legislative tribunals share certain basic features in common. They uniformly reflect a determination by Congress to execute a particularized function of that legislative body, to create a specialized tribunal "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." *Ex parte Bakelite Corp., supra,* 451. In this sense, these specialized courts represent but one of several choices which Congress has at its disposal in implementing the particular constitutional power. "Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." *Ibid.,* 451.[9]

Thus, as was the case before the establishment of the Court of Claims, Congress can resolve by private legisla-

[9] "Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Crowell* v. *Benson,* 285 U.S. 22, 51.

tion all claims against the United States. Or, as happened before the creation of the Court of Customs and Patent Appeals, Congress can commit the resolution of disputes in the administration of the customs laws to executive officers. See *Ex parte Bakelite Corp., supra,* 458. Whatever the choice, the power to make that choice "is completely within congressional control." *Ibid.*

To the extent, but only to the extent, that implementation of a particular Congressional power involves determination of "Cases" and "Controversies", Congress may make still another choice—it may invoke Article III judicial power and invest Article III courts with jurisdiction over such matters. As described long ago by this Court in *Den ex dem. Murray* v. *Hoboken Land & Improvement Co.,* 18 How. 272, 284, these are matters, "involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

An illustration of this type of choice is to be found in 28 U.S.C. §1346, investing federal district courts with jurisdiction "concurrent with the Court of Claims" over specified claims against the United States. By giving such jurisdiction to the district courts, Congress to that extent has invoked the judicial power of the United States, as defined in Article III, to help resolve these claims. But by placing concurrent jurisdiction in the Court of Claims to decide the identical matters, Congress to that extent refrained from invoking Article III judicial power; instead, it chose to exercise its power "to pay the debts . . . of the United States" through a nonjudicial or legislative court.

That placing such concurrent jurisdiction in the Court of Claims does not make that tribunal an Article III court

or call forth the exercise of Article III judicial power is demonstrated by this Court's decision in *United States* v. *Sherwood,* 312 U.S. 584. Involved there was this concurrent grant as contained in the predecessor of §1346, then known as 28 U.S.C. §41(20). In acknowledging the concurrence of jurisdiction there given to district courts and to the Court of Claims, this Court was careful to note (p. 587) that the Court of Claims still remained "a legislative, not a constitutional, court" and that its "judicial power is not derived from the Judiciary Article of the Constitution, but from the Congressional power 'to pay the debts . . . of the United States,' which it is free to exercise through judicial as well as nonjudicial agencies."

The critical feature of a legislative court is thus not in terms of whether it may decide questions, concurrently or otherwise, of the same type as those resolved by Article III courts. Obviously, a legislative court like the Court of Claims and the Court of Customs and Patent Appeals does on occasion decide such issues. Otherwise, were such courts not to possess such "judicial" powers, none of their judgments would be reviewable by this Court. See *Pope* v. *United States,* 323 U.S. 1, 13-14, holding that a judicial determination by a legislative court like the Court of Claims may be subjected to appellate review by this Court even though the nonjudicial functions of such a court are not so subject. In the words of Chief Justice Vinson in his opinion in *National Insurance Co.* v. *Tidewater Co.,* 337 U.S. 582, 641:

> "The legislative courts created by Congress also can and do decide questions arising under the Constitution and laws of the United States (and, in the case of territorial courts, other types of jurisdiction enumerated in Article III, §2 as well), but that jurisdiction is not, and cannot be, 'a part of that judicial power

which is defined in the 3d article of the Constitution.' These courts are 'incapable of receiving it.' *American Insurance Co.* v. *Canter,* 1 Pet. 511 at 546; *Reynolds* v. *United States,* 98 U.S. 145 at 154."

What is decisive as to the identification of a legislative tribunal "lies in the power under which the court was created and in the jurisdiction conferred." *Ex parte Bakelite Corp.,* 279 U.S. 438, 459. Legislative courts, said Chief Justice Marshall, are "created in virtue of the general right of sovereignty which exists in the government." *American Insurance Co.* v. *Canter,* 1 Pet. 511, 546. In other words, quite apart from Article III and even if that Article were omitted from the Constitution, the sovereign power of the United States would justify the creation of judicial tribunals—known to us as legislative courts—to help execute the powers of Congress or the laws of the United States.

The sovereign power of the United States to do all that is necessary to the effective exercise of the federal government is unquestionably broad. To aid in the enforcement of the tax laws, the public land and Indian laws, claims against the United States, customs laws, patent and trademark laws and the like, Congress has utmost freedom in choosing what it considers to be the most effective and appropriate agencies. It can *establish* executive departments, administrative agencies or judicial tribunals to effectuate such sovereignty. And when it does establish and create a judicial tribunal for such a purpose, it does so without regard to Article III. And having thus created this type of court, it can impose on the court any kind of jurisdiction it sees fit, both of a judicial and non-judicial nature.

Hence the grant to legislative courts of certain kinds of judicial power which are also exercisable by Article III courts does not necessarily alter the nature of the legisla-

tive tribunals. Such a grant may merely reflect the freedom which Congress possesses with respect to these tribunals, a freedom to confer on them any kind of power (within the bounds of due process) it so desires. See *American Insurance Co.* v. *Canter,* 1 Pet. 511, 546; *Reynolds* v. *United States,* 98 U.S. 145, 154; *Clinton* v. *Englebrecht,* 13 Wall. 434; *Benner* v. *Porter,* 9 How. 235. And because of that freedom, unlimited as it is by the "case or controversy" concepts of Article III, Congress can give to these legislative courts administrative and executive powers, as well as authority to render advisory opinions—none of which can be given to Article III courts. Constitutionally speaking, Congress can treat a legislative tribunal as it would an administrative agency. Thus it is that Congress has given the Court of Claims jurisdiction "to report to either House of Congress on any bill referred to the court by such House, except a bill for a pension." 28 U.S.C. §1492. And Congress has delegated to the Court of Customs and Patent Appeals the non-Article III function of reviewing patent and trademark decisions of the Patent Office. 28 U.S.C. §1542.

The constitutional freedom of Congress with respect to legislative tribunals further expresses itself in the treatment which can be accorded the judges thereof. Congress can, if it desires, limit the tenure of legislative court judges to a specified number of years; or it may provide life tenure for them. But providing life tenure reflects only a desire of Congress rather than any constitutional mandate and does not alter the legislative status of the judges. *Ex parte Bakelite Corp.,* 279 U.S. 438, 449. Moreover, Congress may, as it did in 1932 (47 Stat. 382, 402), reduce the salaries of legislative court judges during their terms of office. *Williams* v. *United States,* 289 U.S. 553. In dealing with these judges, in other words, Congress is unrestrained by the provision of Article III, Section 1, that judges exercising the judicial power of the United States "shall hold

their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

In a very real sense, therefore, a legislative court judge has no more constitutional status than an administrative or executive officer of the Government. He is subject to the whim of Congress as to tenure and salary and accordingly does not have that constitutional "independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons, and with equal concern for the poor and the rich." *Evans* v. *Gore,* 253 U.S. 245, 253. He can only perform the limited and specialized functions that Congress has delegated to him. Indeed, like a member of an administrative agency, he is and must be an expert in the specialized field of federal law with which he deals.[10] Such narrow expertise may well be a factor in his selection and appointment to a judicial agency of this nature.[11] The considerations that enter into the selection of a man to exercise the broad powers of an Article III court over the

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[10] Senator Cummins, with reference to the bill establishing the Court of Customs and Patent Appeals in 1909, stated during the Senate debate on the bill: "It is no secret upon the floor of the Senate that the purpose of this court is to secure men who either are at the time of their appointment, or will become, experts—specialists in the construction of this [tariff] law." 44 Cong. Rec. 4185. See also Statement of Board of Appraisers, quoted at 44 Cong. Rec. 4194: "The study, construction, and interpretation of customs laws, principles, and precedents . . . requires the whole time, attention, and study of any lawyer . . . charged with its adjudication."

[11] Senator Bailey, during the debate on the bill establishing the Court of Customs and Patent Appeals, said: "But I do believe that the better qualified a judge is to exercise the general jurisdiction of a federal court, the less qualified he is to administer justice in this particular kind of a case." 44 Cong. Rec. 4198.

life, liberty and property of all those who come before it are not necessarily the same as the considerations pertinent to the selection of a man to do the specialized and technical work of a customs or claims court. Compare *Toth* v. *Quarles,* 350 U.S. 11, 17.

Restated in practical terminology, a legislative or Article I court of the type epitomized by the Court of Claims and the Court of Customs and Patent Appeals is an agency established to help perform a particular, narrow function of Congress under Article I. It is a tribunal that is not given the wide range of powers and the broad scope of jurisdiction conferred by the Judicial Code and the Criminal Code. It has not been bequeathed broad judicial power over "matters such as were the traditional concern of the courts at Westminster" as manifested on this side of the ocean. *United Steelworkers of America* v. *United States,* 361 U.S. 39, 60 (concurring opinion of Mr. Justice Frankfurter). Contrariwise, an Article III court is not established simply to hear claims against the United States or to adjudicate appeals from the Patent Office. A constitutional tribunal is designed at birth to exercise, whenever called upon, the full range of the judicial power expressed in Article III, rather than but one or two segments thereof.

Thus, because legislative courts are not established to execute the judicial power of the United States, they are, as Chief Justice Marshall said, "incapable of receiving it." *American Insurance Co.* v. *Canter,* 1 Pet. 511, 546. They are no more capable of receiving it than is an administrative agency like the Securities and Exchange Commission or the National Labor Relations Board, even though on occasion they adjudicate what is a reviewable case or controversy. Such a legislative tribunal "receives no authority and its judges no rights from the judicial article of the Constitution, but . . . derives its being and its powers and

the judges their rights from the acts of Congress passed in pursuance of other and distinct constitutional provisions." *Williams* v. *United States,* 289 U.S. 553, 581.

We accordingly arrive back at the nub of the constitutional issue. To allow any tribunal or judge "incapable of receiving" Article III judicial power to exercise the full permissible range of that power is to do violence to the constitutional separation of powers. The judicial power of the United States has been "definitely assigned by the *Constitution* to one department [and] can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency." *Williams* v. *United States, supra,* 580. How, then, can Congress purport to authorize the assignment of a retired judge of the legislative department to exercise the powers delegated by the Constitution to the judicial department? That indeed is the question adumbrated in *Ex parte Bakelite Corp.,* 279 U.S. 438, 460.

4.

The Article III Nature of the District Court for the District of Columbia.

Turning to the particular courts involved in the case at hand, application of the foregoing principles makes plain their constitutional status. The decision in *O'Donoghue* v. *United States,* 289 U.S. 516, in reliance on those principles, establishes that the United States District Court for the District of Columbia—the court before which petitioner was tried and convicted—is a constitutional court of the United States, ordained and established under Article III of the Constitution, that the judges of that court hold their offices during good behavior, and that their compensation cannot, under the Constitution, be diminished during their continuance in office. Upon no basis of reason,

said the Court (pp. 544-45), can it "be said that these courts of the District are *incapable* of receiving the judicial power under Art. 3." The District Court for the District of Columbia is vested generally with the same jurisdiction and powers as possessed by all other federal district courts located in the various states.

In addition, certain administrative or non-judicial functions may and have been given to this District Court since, in dealing with the District of Columbia, "Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state." *Ibid.*, 545. See also *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428, 442-43; *Butterworth* v. *Hoe*, 112 U.S. 50, 60; *United States* v. *Duell*, 172 U.S. 576; *Baldwin Co.* v. *Howard Co.*, 256 U.S. 35. Such powers stem from the express authority given Congress by the Constitution, Article I, Section 8, Clause 17, to "exercise exclusive Legislation in all Cases whatsoever, over such District." The result of recognizing that the courts of the District may validly exercise both judicial and non-judicial functions has led one commentator to label them hybrid courts. See 1 Moore, Federal Practice, §0.4[4], p. 72 (2d ed. 1960).

But the "fact that Congress, under another and plenary grant of power, has conferred upon these courts jurisdiction over non-federal causes of action, or over quasi-judicial or administrative matters, does not affect the question." *O'Donoghue* v. *United States, supra,* 545. The District Court for the District of Columbia was ordained and established under Article III of the Constitution. The judicial power thus conferred, as the *O'Donoghue* case teaches (p. 546),

> ". . . is not and cannot be affected by the additional congressional legislation, enacted under Article I, §8, cl. 17, imposing upon such courts other duties, which,

> because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere. The two powers are not incompatible; and we perceive no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the operative effect of the judicial clause within the District, where, unlike the territories occupying a different status, that clause is entirely appropriate and applicable."

The court below sought to avoid the constitutional issue posed in this case by relying upon the plenary power of Congress under the District clause, Article I, Section 8, Clause 17. That clause, said the court, is of such broad sweep and of such a plenary nature as to justify the assignment of legislative court judges to exercise "every type of jurisdiction" possessed by the District Court. In so ruling, however, the court below ignored the *O'Donoghue* decision and its demonstration that the District clause of the Constitution is not incompatible with Article III.

However plenary or broad may be the Congressional power over the District of Columbia, such power is necessarily subject to and limited by other provisions of the Constitution. *Capital Traction Co.* v. *Hof,* 174 U.S. 1, 5; *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U.S. 427, 435. To quote again from *O'Donoghue,* 289 U.S. at 539, "The power conferred by Art. 1, §8, cl. 17, is plenary; but it does not exclude, in respect of the District, the exercise by Congress of other appropriate powers conferred upon that body by the Constitution, or authorize a denial to the inhabitants of any constitutional guaranty not plainly inapplicable."

And so in this case, where petitioner is asserting that by virtue of Article III of the Constitution he has the right

to be tried in an Article III court by a judge properly invested with Article III power, it is no answer to say—as the court below said—that Article I, Section 8, Clause 17, authorizes legislation assigning to the District Court for the District of Columbia a judge whose investiture with Article III judicial power need not be determined. In short, the District of Columbia clause of the Constitution is not to be read in a vacuum. If Article III or some provision of the Bill of Rights gives all those accused of federal crimes before the District of Columbia federal court the right to be tried before a judge possessing Article III judicial power, Article I, Sec. 8, Cl. 17, does not carve out an exception thereto.[12] The latter provision is capable of being applied in a manner consistent with Article III and the Bill of Rights. Thus the opinion below only goes to the threshold of the problem and leaves untouched the basic problem as to rights conferred on petitioner and limitations imposed on judicial assignments by Article III.

Indeed, were the decision below to be followed, serious questions would be raised as to the discrimination thereby created against those persons tried before legislative court judges assigned to sit in the District of Columbia courts. That decision assumes, by its silence on the matter, that such an assignment to a federal district court in any of the several states might well be unconstitutional; the situation in the District of Columbia is said to be saved by the plenary scope of Article I, Section 8, Clause 17. Thus the decision below in effect demarcates an exception to Article III, an exception removing the District of Columbia from its impact.

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[12] "Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense." *Metropolitan Railroad Co.* v. *District of Columbia,* 132 U.S. 1, 9. And see *United States* v. *Cella,* 37 App. D. C. 433.

But the District of Columbia and its inhabitants are entitled to the protection of all sections of the Constitution not plainly irrelevant. Thus the recognition of the fundamental rights of life, liberty and property in the Constitution "was demanded and secured for the benefit of all the people of the United States, as well as those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property —especially of the privilege of trial by jury in criminal cases." *Callan* v. *Wilson,* 127 U.S. 540, 550. See also *Capital Traction Co.* v. *Hof,* 174 U.S. 1; *Page* v. *Burnstine,* 102 U.S. 664; *Bolling* v. *Sharpe,* 347 U.S. 497, 499.[13]

Thus to the extent that Article III may be said to ban the assignment of legislative court judges to sit on constitutional courts, that ban must apply equally as to constitutional courts in the various states and in the District of Columbia. Particularly is this true in light of the *O'Donoghue* ruling that Article III and Article I, Section 8, Clause 17, are compatible. The District clause, in other words, justifies no exception from the impact of Article III.

We therefore arrive back at the basic proposition established by *O'Donoghue* that the District Court for the District of Columbia is essentially and primarily an Article III tribunal, a status unaffected by its possession of certain non-judicial functions. Both the court and its judges are

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[13] See Sec. 34 of the Act of Feb. 21, 1871, creating a government for the District of Columbia, which declared: "The Constitution, and all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States." 16 Stat. 426.

capable of receiving and do exercise the judicial power of the United States. And to the extent that Article III requires that power to be exercised only by judges capable of receiving and executing Article III power, that requirement applies to the judges purporting to exercise such power in the District Court for the District of Columbia.

The thrust of the foregoing considerations on this case is in no way affected by the fact that the judicial power was here exerted with respect to a criminal violation of the District of Columbia Code. Presumably, jurisdiction over such a violation could have been placed in some lesser tribunal, such as the Municipal Court for the District of Columbia, which lacks many of the indicia of an Article III court.[14] But the possibility that jurisdiction over the trial of such a crime could have been given to a legislative court does not make the trial a legislative proceeding when jurisdiction thereof is conferred upon the District Court.

All that Congress has done here is to invoke the Article III judicial power of the District Court to help execute certain criminal statutes enacted under the District clause of the Constitution, Article I, Section 8, Clause 17. In the same way, Congress has called upon the Article III judicial power of other federal district courts to help execute certain state criminal laws made applicable by the assimilative crimes statute (18 U.S.C. §13) to the other

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[14] Judges of the Municipal Court for the District of Columbia are appointed "for a term of ten years each." 11 D.C. Code §753. Congress has given to this court jurisdiction over most misdemeanor cases and civil actions not in excess of $3,000. 11 D.C. Code §755(a). It is denominated one of the "inferior courts" of the District, the "superior courts" for the exercise of the "judicial power in the District" being the Municipal Court of Appeals, the United States District Court, the United States Court of Appeals and the Supreme Court of the United States. 11 D.C. Code §101.

federal areas referred to in Article I, Section 8, Clause 17.[15] Likewise, Congress has called upon the Article III judicial power of all federal district courts to aid in the execution of a host of other Article I powers of Congress—ranging from commerce and taxation to patents and bankruptcy.

In all these situations, Congress could have decided to give at least some if not all the judicial powers thus invoked to legislative courts; and some of the powers could have been exercised, at least in the first instance, by administrative tribunals. But the critical fact is that Congress did decide to activate Article III judicial power, which is nonetheless Article III in nature because Congress might have chosen some other technique to help in the execution of Article I authority.

The complete answer to any contention that Congress, in legislating for the District, is reduced to a mere local legislature and that any judicial proceedings emanating from such enactments are necessarily legislative in nature is to be found in *Cohens* v. *Virginia,* 6 Wheat. 264, 424-9. In holding that a Congressional act authorizing lotteries within the District of Columbia was indeed a law of the United States, this Court, speaking through Chief Justice Marshall, said:

> "In the enumeration of the powers of Congress, which is made in the 8th section of the first article, we

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[15] See *Franklin* v. *United States,* 216 U.S. 559; *Johnson* v. *Yellow Cab Transit Co.,* 321 U.S. 383; *Mannix* v. *United States,* 140 F.2d 250 (C.A. 4); *United States* v. *Tucker,* 122 F. 518 (D. Ky.). And see *Cohens* v *Virginia,* 6 Wheat. 264, 426-9, discussing the identity of power springing from Article I, Section 8, Clause 17, to legislate both for the District of Columbia and for forts, arsenals, dockyards and other property of the United States. In both instances, said Chief Justice Marshall, Congress enacts laws of the United States, binding the nation and "uniting the powers of local legislation with those which are to operate through the Union, and may use the last in aid of the first." 6 Wheat. at 427.

find that of exercising exclusive legislation over such district as shall become the seat of government. This power, like all others which are specified, is conferred on Congress as the legislature of the Union; for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the Union; for, it is in that character alone that the constitution confers on them this power of exclusive legislation. This proposition need not be enforced.

"The 2d clause of the 6th article declares, that 'this constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land.'

"The clause which gives exclusive jurisdiction is, unquestionably, a part of the constitution, and, as such, binds all the United States. . . .

* * * * *

" . . . the power vested in Congress, as the legislature of the United States, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. . . . Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution."

It thus becomes self-evident that Congress can, as a means of securing "complete and effectual execution" of its plenary power over the District of Columbia, call for the exercise of Article III judicial power to aid in enforc-

ing the District criminal code. And to call upon the District Court for the District of Columbia to conduct a criminal trial is necessarily to invoke that court's Article III judicial power. Whether the crime is one outlawed by the District of Columbia Code or by Title 18 of the United States Code, the power to be exercised by the District Court is the power extended to the "trial of criminal cases" (*Toth* v. *Quarles*, 350 U.S. 11, 15) "arising under . . . the Laws of the United States" (Art. III, Sec. 2).

The power thus kindled brings forth all the procedural and substantive devices created by and for this Article III tribunal to deal with criminal prosecutions, devices which in many ways are unique to Article III courts. In no sense does the court put on a legislative cap to try District Code crimes and a constitutional cap to try Title 18 crimes. Both are treated the same; both evoke the same scope of judicial power.

The non-judicial functions of the District of Columbia courts are not identifiable with criminal trials under the local code. Rather they relate to certain administrative or executive powers, of a type not conferrable on other federal district courts or courts of appeals. Thus, at one time or another, the District of Columbia courts have been given such functions as advising as to the valuation of utility property,[16] reviewing Patent Office decisions,[17] en-

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[16] See *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428, holding it to be a legislative function of the District Court to advise, pursuant to what is now 43 D.C. Code §704, the District Public Utilities Commission as to elements of value to be considered in arriving at a true valuation of utility property.

[17] See *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, holding that the decisions of the Court of Appeals for the District of Columbia in patent and trademark appeal cases are not reviewable judgments but merely instructions "by a court which is made part of the machinery of the Patent Office for administrative purposes." The jurisdiction over such appeals has been transferred, however, to the Court of Customs and Patent Appeals. 45 Stat. 1475.

tertaining probate and divorce proceedings,[18] and appointing members of the local school board.[19] None of those matters is within the jurisdiction of any other Article III tribunal. But no decision of this Court or of any other court has ever suggested that a criminal trial, however grounded it may be in the District Code, partakes of any segment of the legislative functions of this District Court.[20]

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[18] The District Court has been given jurisdiction over probate and estate matters (11 D.C. Code §§501-504), but other federal courts have "no jurisdiction to probate a will or administer an estate." *Markham* v. *Allen*, 326 U.S. 490, 494. And until 1956 (see 70 Stat. 112 and 16 D.C. Code §416), the District Court had jurisdiction over divorce and alimony matters, which are outside the powers of other federal district courts. *Barber* v. *Barber*, 21 How. 582; *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379.

[19] "The members of the Board of Education shall be appointed by the United States District Court judges of the District of Columbia for terms of three years each." 31 D.C. Code §101.

[20] An administrative agency, for example, could not be selected to impose any criminal sanctions established by Congress under the District Code. Nor could an executive officer be selected. Not even Congress itself could reserve the right to determine criminal guilt. As stated in *McFarland* v. *American Sugar Refining Co.*, 241 U.S. 79, 86, "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." See also *Tot* v. *United States*, 319 U.S. 463, 469. Indeed, a federal criminal proceeding is a prime example of the kind of action that requires the exercise of the judicial power defined in Article III and that is invariably exercised by Article III tribunals. See *Williams* v. *United States*, 289 U.S. 553, 578. The possession of minor criminal jurisdiction by the Municipal Court for the District of Columbia reflects (a) the plenary *choice* of *judicial* tribunals which Congress has by virtue of the District clause of the Constitution, and (b) the universally recognized doctrine that petty crimes and misdemeanors may be handled by inferior courts.

5.

The Article I Nature of the Court of Customs and Patent Appeals.

As indicated, Judge Joseph R. Jackson, who presided over petitioner's trial in the District Court below, was nominated and confirmed as a judge of the Court of Customs and Patent Appeals in 1937 and retired therefrom in 1952. During that period of time there can be no question but that the Court of Customs and Patent Appeals was "a legislative and not a constitutional court." *Ex parte Bakelite Corp.*, 279 U.S. 438, 459. It was a court created by Congress in 1909,[21] as the *Bakelite* opinion, pp. 458-9, pointed out,

> " . . . in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the customs court, formerly called the board of general appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the

[21] Tariff Act of 1909, 36 Stat. 105. That statute provided that "a United States Court of Customs Appeals is hereby created, and said court shall consist of a presiding judge and four associate judges appointed by the President, by and with the advice of the Senate, each of whom shall receive a salary of ten thousand dollars per annum. It shall be a court of record, with such jurisdiction as hereinafter established and created." No provision was made as to the tenure of the judges; nor did this statute attempt to designate the court as one created pursuant to Article III.

provisions of the customs laws requiring duties to be paid and turned into the treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.

"This summary of the court's province as a special tribunal, of the matters subjected to its revisory authority, and of its relation to the executive administration of the customs laws, shows very plainly that it is a legislative and not a constitutional court."

The essence of the *Bakelite* decision and its categorization of the Court of Customs and Patent Appeals as a legislative court is the emphasis on the fact that it was established not to exercise the broad judicial powers set forth in Article III but to implement and carry into execution the narrow Congressional power under Article I to lay and collect duties on imports. Such implementation could be, and at earlier times had been, performed by executive officers of the Government. The Congressional choice of a judicial body to perform these chores could not disguise the mark that permeates all such specialized legislative courts—the confinement of jurisdiction to specified matters arising between the Government and others in the administration of a particular power of Congress.

Thus the conclusion was compelled that this court was not created to execute, and does not in fact execute, the gamut of the judicial power of the United States as possessed by the federal district courts and courts of appeals.

The limited nature of its birth and its jurisdiction made impossible any designation of it as an Article III tribunal. The unanimous conclusion thus reached in *Bakelite* was later reaffirmed—again unanimously—in *Williams* v. *United States,* 289 U.S. 553, 571. There this Court took pains to state that "Further reflection tends only to confirm the views expressed in the *Bakelite Corp.* opinion as to the status of the Court of Customs Appeals, and we feel bound to reaffirm and apply them." [22]

Leaving aside for the moment the effect of the 1958 legislation labeling the Court of Customs and Patent Appeals an Article III court, Congress has consistently treated this body as a legislative tribunal. During its birth pangs in 1909, there was no denial of the fact that Congress was thereby creating "not a court, but merely a board." 44 Cong. Rec. 4191. As one of the opponents of the bill, Senator Cummins, stated, "you are endeavoring to combine a court and an expert; you are endeavoring to combine a board and a judicial tribunal . . . " 44 Cong. Rec. 4191. And there was no refutation of that point.[23]

Not until 1930, following the *Bakelite* decision, did Congress seek to provide the judges of this "board" with tenure "during good behavior." Act of June 17, 1930, 46

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[22] In the *Williams* case, the then Solicitor General took the position that the Court of Claims, like the Court of Customs and Patent Appeals, was not an Article III court—a position which the Court sustained. But in 1944 in *Pope* v. *United States,* 323 U.S. 1, after a restudy of the question, Solicitor General Fahy's brief argued that the *Williams* case was wrong. The Court in the *Pope* case, 323 U.S. at 13, however, found it unnecessary "to consider what effect the imposition of non-judicial duties on the Court of Claims may have affecting its constitutional status as a court and the permanency of tenure of its judges."

[23] Another opponent of the creation of the court, Senator Borah, stated: "Now we are told that we should create not a court, but merely a board, because we want an honest and successful administration of the laws which we enact here." 44 Cong. Rec. 4191.

Stat. 762, 28 U.S.C. §301a (1940 ed.). It then sought to make such tenure retroactive, indicating that prior to the 1930 statute the judges may well have held office only at the will of the President or Congress. To be sure, a legislative court judge may hold office "for such term as Congress prescribes, whether it be a fixed term of years or during good behavior" without affecting his legislative status. *Ex parte Bakelite Corp.*, 279 U.S. 438, 449. Thus the 1930 legislation proves nothing except to demonstrate the freedom which Congress has with respect to legislative court judges—a freedom to provide good behavior tenure if it so desires.[24] In contrast, Article III court judges are endowed with good behavior tenure by virtue of the constitutional mandate, which Congress is not free to disregard.

Moreover, when Congress enacted the Legislative Appropriation Act of June 30, 1932, 47 Stat. 382, 402, reducing the salaries of all judges other than Article III judges to $10,000 per annum, the judges of the Court of Customs and Patent Appeals were quick to comply.[25] And this Court in

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[24] See 71 Cong. Rec. 2043 (May 27, 1929):

MR. CHINDBLOOM. When this court was established it was believed to be a constitutional court that it was not necessary to fix the term. I understand there was a contrary opinion in the other body [Senate].

MR. LAGUARDIA. It was my understanding that it was a legislative body.

MR. CHINDBLOOM. I am referring back to a previous Congress years ago . . .

[25] The judges of the Court of Customs and Patent Appeals voluntarily accepted the reduction in salary from $12,500 to $10,000 and waived any constitutional claims they might otherwise have made—futile though such claims might have been by virtue of the *Williams* decision.

On July 11, 1932, the Presiding Judge of the Court of Customs and Patent Appeals addressed the following letter to Attorney General William D. Mitchell:

"I am enclosing herewith a waiver of constitutional rights signed by the judges of our court under the new so-called

Williams v. *United States,* 289 U.S. 553, held that Congress could make such a reduction as to judges of the Court of Claims because they, like judges of the Court of Customs and Patent Appeals, were merely legislative court judges. In contrast, the companion decision in *O'Donoghue* v. *United States,* 289 U.S. 516, held that such a legislative reduction in salary could not be made as to judges of the District of Columbia courts because of their constitutional status. Hence this 1932 action of Congress in cutting the salaries of judges of the Court of Customs and Patent Appeals is a dramatic illustration of the legislative control over those judges retained by Congress. Had such judges had any semblance of Article III power, the Constitution would have forbidden this salary reduction.

The only major accretion of jurisdiction by the Court of Customs and Patent Appeals since its creation serves further to demonstrate the legislative viewpoint exhibited

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economy act, which I wish you would have referred to the proper department. In doing this, I think our judges are moved by the idea that they want to be as helpful as possible in the emergency. The plan, however, of reducing the salaries of the Federal Judiciary during their term of office, whether voluntary or involuntary, is in opposition to the theory upon which the makers of the Constitution acted."

The enclosed waiver, signed by all judges, read as follows:

"To the Department of Justice, Washington, D. C.

"In conformity with the provisions of section 109 of an act entitled 'An Act making appropriations for the Legislative Branch of the Government for the fiscal year ending June 30, 1933, and for other purposes,' approved June 30, 1932, we, the undersigned presiding judge and associate judges of the United States Court of Customs and Patent Appeals hereby waive any constitutional exemption which we may have from a diminution of salary during our respective terms of office, and respectively remit such part of the compensation as would not be paid to each of us if such diminution of compensation were not prohibited, such waiver to be effective only during the fiscal year ending June 30, 1933.

"July 11, 1932."

by Congress toward this Court. In 1929, legislation was enacted transferring to this court the jurisdiction previously possessed by the Court of Appeals for the District of Columbia to review directly the patent and trademark determinations of the Patent Office. Act of March 2, 1929, 45 Stat. 1475. This transfer was made with full knowledge of the decision of this Court in *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, holding that such patent and trademark jurisdiction in the Court of Appeals was administrative rather than judicial in nature.

In fact, the House of Representatives had passed the identical transfer bill at an earlier session of Congress with the distinct understanding that the constitutionality of the transfer of jurisdiction was assured by virtue of the legislative nature of the Court of Customs and Patent Appeals. See 68 Cong. Rec. 3181-2 (69th Cong., 2d Sess., Feb. 7, 1927). The constitutionality of the transfer statute was said to have been raised by this Court's decision in the *Postum Cereal* case, and in order to "establish the constitutionality of the act" a memorandum was inserted in the Congressional Record. 68 Cong. Rec. 3181-2. That memorandum, which is reproduced in full in the Appendix to this brief, sharply distinguished between Article III and Article I tribunals, and labeled the Court of Customs Appeals (as it was then known) as a tribunal springing from the power of the United States as a sovereign rather than from the power to create inferior courts under Article III. On that basis, said the memorandum, the Court of Customs Appeals could accept jurisdiction over such patent and trademark matters.

Parenthetically, it should be noted that this memorandum was inserted as Appendix H to the Brief on behalf of the United States Court of Customs Appeals, signed by Solicitor General William D. Mitchell, in the *Bakelite* case,

No. 17, Original, October Term 1928, pp. 64-68. That brief referred to the document as "an interesting memorandum dealing with this subject" (p. 36) and merely stated that if, as the memorandum argued, there was an implied sovereign power to organize courts to deal with specialized problems "we do not see why the action of Congress in creating the United States Court of Customs Appeals should be ascribed to it" (p. 37).[26]

And there are indications that the Court of Customs and Patent Appeals itself was wary of accepting jurisdiction over patent and trademark appeals until its legislative nature was definitely established by this Court. As stated by one contemporary commentator:

> "At the time of the passage of that act [Act of March 2, 1929, transferring patent and trademark appeals to Court of Customs & Patent Appeals] there was pending in the Supreme Court a case involving the question of whether the Court of Customs Appeals was a so-called Constitutional court or a legislative court. Apparently until this question was settled the Court of Customs and Patent Appeals did not feel justified in hearing any appeals from the Patent Office. The Supreme Court handed down its decision in ex parte Bakelite Corp. in May of 1929 indicating that the Court of Customs and Patent Appeals was a legislative court, from which it was to be inferred that the court could properly take jurisdiction of appeals from the Patent Office. Accordingly the Court of Customs and Patent Appeals heard argument in its first

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[26] The brief was submitted at the time when the legislation to transfer the patent and trademark jurisdiction to the Court of Customs Appeals was still pending in Congress. The *Bakelite* oral argument occurred on January 2 and 3, 1929. The transfer statute became law on March 2, 1929. The *Bakelite* decision of this Court was rendered on May 20, 1929.

patent cases in June of 1929." Fenning, *Court of Customs and Patent Office Appeals,* 17 A.B.A.J. 323 (1931).

Thus the correctness of this Court's designation of the Court of Customs and Patent Appeals as a legislative court has been fully sustained by the history of Congressional attitudes toward that court prior to 1958. Much of the same considerations put forth last Term by the United States in this case, No. 669, October Term 1960, though not in the same depth, were placed before the Court in the *Bakelite* case. The briefs submitted by both the Bakelite Corporation and the Court of Customs Appeals strenuously urged that the legislation establishing the court, the intention of Congress, the jurisdiction conferred, the "cases" and "controversies" heard by the court, and the legislative history all confirmed the constitutional and Article III status of the court. Yet this Court unanimously rejected that conclusion.

In short, the legislative or Article I nature of the Court of Customs and Patent Appeals is readily apparent from the following comparative considerations:

Characteristics of an Article III court	*Characteristics of Court of Cust. & Pat. Apps.*
1. Jurisdiction and power arise solely out of Article III cases and controversies. Possesses the full judicial powers traditionally associated with a court in both civil and criminal matters. Jury system an integral part of its procedure.	1. Jurisdiction and power confined to what Congress has given it as a consequence of its exercise of legislative powers over customs and patents. Such jurisdiction and power could as easily be exercised by an administrative board or ex-

Characteristics of an Article III court	*Characteristics of Court of Cust. & Pat. Apps.*
	ecutive officer. Possesses few of the inherent or broad judicial powers associated with Article III courts. No provision for jury trials.
2. All judgments are ultimately reviewable by the Supreme Court.	2. Not all judgments are reviewable by Supreme Court. Patent and trademark judgments are considered to be non-reviewable administrative judgments. *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693; *Pacific Co.* v. *Skookum Assn.*, 283 U.S. 858; *McBride* v. *Teeple*, 311 U.S. 649.
3. Judges are selected on basis of qualifications to deal with broad range of cases and controversies, both of a criminal and civil nature.	3. Judges are selected who are qualified and able to be proficient in knowledge of the technical aspects of the fields of patent and customs law. See 44 Cong. Rec. 4185, 4194, 4198.
4. Judges hold office during good behavior—i.e., for lifetime unless impeached —by virtue of Article III, Section 1.	4. Judges have held office during good behavior only, since 1930, when what is now 28 U.S.C. §213 was adopted. Prior

Characteristics of an Article III court	*Characteristics of Court of Cust. & Pat. Apps.*
	thereto, tenure was not specified or certain. A judge of this court may hold office "for such term as Congress prescribes, whether it be a fixed term of years or during good behavior," without affecting his legislative status. *Ex parte Bakelite Corp.*, 279 U.S. 438, 449. See 71 Cong. Rec. 2043.
5. Compensation of judges may not be diminished during continuance in office. Article III, Section 1. See *O'Donoghue* v. *United States*, 289 U.S. 516.	5. Compensation of judges was in fact diminished in 1932 from $12,500 to $10,000. See *Williams* v. *United States*, 289 U.S. 553.

That the Court of Customs and Patent Appeals may have many of the outward trappings of an Article III court in terms of staff, seals, salaries and the like does not, of course, transform the court into an Article III tribunal. The distinctions between the two types of judicial bodies are grounded in more fundamental considerations than that.

Nor is the status of the court necessarily altered by the fact that the court deals with matters that may be said to arise under the Constitution, law and treaties of the United States, or with controversies to which the United States is a party. Any claim involving the United States,

any proceeding before the N.L.R.B. or the S.E.C., may be said to arise under the laws of the United States or to involve a controversy to which the United States is a party. But at least where the resolution of that controversy may be had pursuant to a special law of Congress in a tribunal that does not and need not have the full powers of a court, Article III power is not thereby invoked and the tribunal is not thereby transformed into one of constitutional status. So it is with the Court of Customs and Patent Appeals. The controversies and matters it resolves may all be dealt with by use of the special, limited powers given it by Congress under special statutes.

At least prior to 1958, therefore, the Court of Customs and Patent Appeals and its judges possessed none of the essential attributes of Article III judicial power. They merely had power in the nature of that given to administrative agencies or executive officers to pass upon a limited type of controversies between the Government and individuals.

6.

The Effect of the 1958 Congressional Designation of the Court of Customs and Patent Appeals as an Article III Court.

As indicated, there is not the slightest indication prior to August 25, 1958, that the Court of Customs and Patent Appeals was anything other than a legislative court.[27] Neither the court nor its judges were thought to possess or be capable of receiving Article III judicial power. And it was clearly evident that Judge Jackson was nominated,

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[27] In *Bland* v. *Commissioner*, 102 F.2d 157 (C.A. 7), *certiorari denied*, 308 U.S. 563, and in *Magruder* v. *Brown*, 106 F.2d 428 (C.A. 4), *certiorari denied*, 308 U.S. 624, no basis was found for assuming that this Court intended to recede from its pronouncements in the *Bakelite* and *Williams* cases.

confirmed and served as a judge of a purely legislative court during his term ending in 1952.

Then in 1958, some six years after Judge Jackson had retired from the court, Congress enacted an amendment to 28 U.S.C. §211 providing that the Court of Customs and Patent Appeals "is hereby declared to be a court established under Article III of the Constitution of the United States." Act of August 25, 1958, 72 Stat. 848. It thus becomes necessary to inquire into the impact of this legislation on the status of the court and on the capacity of its judges, and Judge Jackson in particular, to receive and exercise Article III judicial power.

By virtue of the 1958 amendment, 28 U.S.C. §211 now reads:

> "The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals. Such court is hereby declared to be a court established under article III of the Constitution of the United States."

As stated in the authoritative legislative report, S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News, pp. 3309-3310, the primary purpose of this amendment was

> " . . . to settle the status of the Court of Customs and Patent Appeals by declaring it to be a constitutional court. The court is now constituted under section 211 of title 28, United States Code, and is classified as a legislative court. Section 1 of the bill would amend section 211 so as specifically to declare the court 'to be a court established under article III of the Constitution of the United States.'

"The cases over which the Court of Customs and Patent Appeals has jurisdiction come within the judicial power of the United States as set forth in article III, which provides that such judicial power shall extend to controversies to which the United States shall be a party. Prior to the creation of the court by the Tariff Act of 1909 the jurisdiction which it now exercises to review decisions of the Customs Court (until 1926 called the Board of General Appraisers) was exercised by the former circuit courts of the United States under section 15 of the Customs Administrative Act of June 10, 1890 (ch. 407, 26 Stat. 138). The old circuit courts were, of course, constitutional courts. And prior to April 1, 1929, the jurisdiction which the court now exercises to review decisions of the Patent Office was exercised by the Court of Appeals for the District of Columbia, a constitutional court. See the act of March 2, 1929 (ch. 488, 45 Stat. 1476). Thus there can be no doubt that the Court of Customs and Patent Appeals should be a constitutional court.

"Similar legislation was enacted by the 83rd Congress establishing the Court of Claims as a constitutional court (act of July 28, 1953, ch. 253, 67 Stat. 226) and by the 84th Congress establishing the Customs Court as a constitutional court (act of July 14, 1956, ch. 589, 70 Stat. 532). There has never been any revisory power in the executive or legislative branches of the Government over the decisions of the Court of Customs and Patent Appeals. On the contrary its decisions are final, subject only to review by the Supreme Court of the United States. The bill will remove all doubt as to the status and source of authority of the court by making it explicitly clear that it is established under and derives its judicial power from article III of the Constitution."

The bill to designate the Court of Customs and Patent Appeals as a constitutional court and to make various other amendments involving the assignment of judges was known as H.R. 7866, 85th Cong. When this bill reached the floor of the House of Representatives for discussion,[28] Representative Celler and Representative Keating both made it plain that the bill "makes no change in the structure, organization, or jurisdiction of the court." 104 Cong. Rec. 16095 (Aug. 4, 1958). Representative Keating added, however, that:

> "The Court of Customs and Patent Appeals hears appeals in patent, customs and tariff cases raising questions under the Constitution, the laws of the United States, and treaties made under their authority. Its jurisdiction also extends to controversies to which the United States is a party. This subject matter has always been of the type to which jurisdiction extends by virtue of the Constitution. Under these circumstances, the court itself should be established as a constitutional court under article III."

In sum, the 1958 legislation was the last in a series of three Congressional steps taken to overrule this Court's decisions in the *Bakelite* and *Williams* cases. In 1953 the Court of Claims was declared to be a constitutional court, 67 Stat. 226, 28 U.S.C. §171, contrary to the conclusion reached in the *Williams* case, 289 U.S. at 581, that the Court of Claims "receives no authority and its judges no rights from the judicial article of the Constitution." In 1956 the Court of Customs was declared to be a constitutional court, 70 Stat. 532, 28 U.S.C. §251, contrary to this

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[28] The Senate discussion of the bill was unilluminating with respect to the problem here under inquiry. 104 Cong. Rec. 17548-17549 (Aug. 14, 1958).

Court's description of its functions in the *Bakelite* case, 279 U.S. at 457-8, as "all susceptible of performance by executive officers." And the 1958 legislation with reference to the Court of Customs and Patent Appeals was in direct collision with the *Bakelite* determination, 279 U.S. at 458-9, that this court's background and functions "shows very plainly that it is a legislative and not a constitutional court." Essentially the same reasons were advanced by Congress in each of these three instances for declaring the respective courts to be spawned under Article III. In each instance the primary reason was that the given court in fact exercises jurisdiction over matters arising under the Constitution and laws of the United States, and within the judicial power of the United States, and hence should be classified as constitutional.[29]

Of direct pertinence to the instant case is the fact that Congress, in the process of declaring the Court of Claims a constitutional court in 1953, also sought to remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to sit on the Court of Claims. By labeling the tribunal a constitutional court and then expressly providing for such assignments, said the authoritative House Report,[30] Congress would thereby remove all of the "considerable doubt expressed as to the authority of Congress to provide for the assignment of a judge of a constitutional court to sit on the Court of Claims in view of the ruling

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[29] See H. Rep. No. 695, 83rd Cong., 1st Sess. (1953), 2 U.S. Code Cong. and Adm. News (1953), p. 2006, as to the Court of Claims; H. Rep. No. 2348, 84th Cong., 2d Sess. (1956), 2 U.S. Code Cong. and Adm. News (1956), p. 3122, as to the Court of Customs.

[30] H. Rep. No. 695, 83rd Cong., 1st Sess. (1953), 2 U.S. Code Cong. and Adm. News (1953), p. 2009.

that it was a legislative and not a constitutional court." [31] Such considerable doubt presumably sprang from the observation of this Court in the *Bakelite* case, 279 U.S. at 460, that there might "be constitutional obstacles to assigning judges of constitutional courts to legislative court."

And by providing subsequently for the interassignment of judges between the district and circuit courts on the one hand and the Court of Customs and the Court of Customs and Patent Appeals on the other, see 28 U.S.C. §§291, 292, 293, following the designation of the latter two courts as constitutional tribunals, Congress seemingly sought to erase any doubts as to the constitutionality of such assignments.[32]

Thus the ultimate constitutional issue as to the assignment of Judge Jackson to the District Court below, as well as the thrust of the 1958 legislation on that issue, becomes clear. This Court, as a matter of constitutional analysis, has established that there are very real distinctions between legislative and constitutional courts. As far back as 1828, when Chief Justice Marshall delivered the *American Insurance Co.* opinion, 1 Pet. 511, those distinctions have been recognized as creating a wall between such courts to the point where legislative courts and their judges are "incapable of receiving" any of the judicial power of the United States flowing from Article III of the Consti-

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[31] "Doubt as to the constitutionality of assigning judges from constitutional to legislative courts and vice versa was a reason Congress assigned for classifying the Court of Claims and Customs Court as constitutional courts." 1 Moore, Federal Practice, §0.4[1], p. 60, note 34 (2d ed., 1960).

[32] In *Irish* v. *United States,* 225 F.2d 3 (C.A. 9), a judge from the then territorial district court of Hawaii, a legislative court, was assigned to sit on the Court of Appeals for the Ninth Circuit, a constitutional court. This assigned judge wrote the opinion for the Court of Appeals. Doubt has been expressed as to the wisdom of such an assignment. See Note, 69 Harv. L. Rev. 760 (1956).

tution. Hence it has been assumed, as the *Bakelite* opinion implied (279 U.S. at 460), that this incapacity constitutionally foreclosed the assignment of legislative court judges to sit on constitutional courts so as to exercise Article III judicial power. Certainly Congress so assumed, and acted on that assumption, in its triadic effort to authorize such assignments.

The 1958 declaration by Congress as to the constitutional status of the Court of Customs and Patent Appeals represents a critical step in any attempt to legitimatize the assignment at issue in this case. Is such a declaration constitutionally effective? And to the extent that it is effective, can it be applied retroactively so as to invest an already retired legislative court judge with Article III powers? Those are among the questions to be answered in this case. And the substantiality and difficulty implicit in those questions are clearly reflected in the action of the Judicial Conference of the United States qualifying its approval of the 1958 legislation by expressing "no view on the question whether the declaration that the United States Court of Customs and Patent Appeals was a court established under Article III of the Constitution of the United States would be constitutionally effective." [33]

At the base of the constitutional distinction between legislative and constitutional courts, to reiterate, is a very simple factor: under what article of the Constitution was Congress acting when it created the particular court and endowed it with specified jurisdiction? If Congress was acting in the execution of one of its specific Article I

[33] See S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News (1958), p. 3916. The Committee on Revision of the Laws of the Judicial Conference further stated "that it regarded that as a judicial question for determination by the Federal courts if it arose and not within the competence of the Judicial Conference or its committees."

powers, the court is legislative in nature. But if Congress was acting in order to execute the broad judicial power of the United States under Article III, the court is a constitutional tribunal.

That is precisely the demarcation made by this Court in *Ex parte Bakelite Corp.*, 279 U.S. 438, 459, when it pointed out that it is a mistake to assume that "whether a court is of one class or the other depends on the intention of Congress," since "the true test lies in the power under which the court was created and in the jurisdiction conferred." Moreover, and in words of highest relevance to this case, the Court further noted that any constitutional obstacles to assigning judges from one type of court to another cannot be avoided "on the theory that Congress intended the court to be in one class when under the Constitution it belongs in another." 279 U.S. at 460.

To put the matter simply, a court assumes a certain status at the time of its legislative birth. In the absence of any change in the nature, functions or jurisdiction of the court, that status can no more be changed merely by a subsequent legislative declaration than can the stripes of a tiger be erased by a joint resolution of Congress. Only if there is some change in the nature or jurisdiction of the court, or some effective form of substantive reorganization of the court, can a court be transposed from a legislative to a constitutional status, or vice versa.

Here the original status of the Court of Customs and Patent Appeals has been authoritatively determined by this Court in the *Bakelite* and *Williams* cases. But in seeking to change that status in 1958, Congress made it quite clear that it was making "no change in the structure, organization, or jurisdiction of the court." 104 Cong. Rec. 16095 (Aug. 4, 1958). Congress effectively eschewed any intention of giving that court any new powers which might

be fairly construed as Article III powers. Thus the 1958 change was merely a semantic one, a change of nomenclature. Needless to say, constitutional distinctions of this far-reaching importance must rest on something more substantial than a word change.

The shallowness of such a change was recognized by the Deputy Attorney General of the United States in 1955 in commenting on the proposal to label the Customs Court a constitutional court.[34] The position taken by that bill, he said, "seems to be that the distinction between a legislative and a constitutional court is a matter of language." He then proceeded to call the attention of the Chairman of the House Committee on the Judiciary to this Court's opinion in the *Bakelite* case where the Customs Court had been found to perform only executive functions; and he quoted without comment the portion of that opinion explaining that the status of a court depends not on the intention of Congress but on the power under which the court was created.

The statement of Congress in 1958 that the Customs and Patent Appeals Court was thenceforth to be known as a constitutional court thus comes to no more than an expression of Congressional opinion completely divorced from any change in the nature or functions of that court. It is precisely the kind of expression which the *Bakelite* case held to be wholly irrelevant. And the rationale given for making such a declaration, to the effect that the cases coming before that court do indeed fall within the judicial power of the United States as set forth in Article III, is nothing more than an attempt to second-guess this Court's

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[34] Letter from William P. Rogers, Deputy Attorney General, to Representative Celler, Chairman of the House Committee on the Judiciary, dated July 29, 1955, attached to H. Rep. No. 2348, 84th Cong., 2d Sess. (1956), 2 U.S. Code Cong. and Adm. News (1956), p. 3124.

definitive resolution of that matter in the *Bakelite* and *Williams* cases.[35] Prolonged discussion is unnecessary to demonstrate that this Court, not Congress, is the final authority in determining the applicability of the various articles of the Constitution to courts created by Congress. Cf. *Pennekamp* v. *Florida,* 328 U.S. 331, 335.

The conclusion is inescapable that the 1958 declaration of Congress, absent any change in the structure, organization or jurisdiction of the court, was totally ineffective to transform the Court of Customs and Patent Appeals into a constitutional or Article III tribunal. And the judges of that court—both the retired and the active judges—were no more capable of receiving or exercising Article III judicial power after that declaration than before it. Hence there is lacking any constitutional sanction for applying the assignment statute, 28 U.S.C §294(d), so as to permit the assignment of a legislative court judge, especially a retired one, to an Article III court in order to exercise the judicial power of the United States in a criminal proceeding.

This conclusion is in no way altered by the fact that the *O'Donoghue* decision determined that the courts of the District of Columbia are of a hybrid nature, exercising both non-Article III and Article III powers. A legislative court judge, incapable of receiving or exercising Article III judi-

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[35] In reporting the bill to fasten the constitutional court label on the Court of Claims, the House Committee on the Judiciary stated *inter alia*: "It seems certain that Congress, when it established the Court of Claims in 1854, intended to create a court under article III. (See Congressional Globe, 33d Cong., 2d sess., pp. 71, 72, 105-106, 110, 111, 113, and 114.) . . ." H. Rep. No. 695, 83rd Cong., 1st Sess. (1953), 2 U.S. Code Cong. and Adm. News (1953), p. 2007. Such a statement, made 99 years after the establishment of the court, cannot serve to change the legislative purpose or power in establishing the court, as determined in the *Williams* case. See *United States* v. *United Mine Workers,* 330 U.S. 258, 282.

cial power, is no more capable of exercising such power in a hybrid court to which he may be assigned than he is in a court organized exclusively under Article III. He is just as unable to execute the judicial power of the United States in a court of the District of Columbia as is a member of the National Labor Relations Board were Congress suddenly to denominate the Board an Article III court and give the members life tenure.

7.

The Post-1958 Status of Judge Jackson.

In order to sustain the constitutionality of the 1960 assignment of Judge Jackson to the District Court below, it must be established just where and when he became capable of receiving and exercising Article III judicial power. That determination, of course, involves no question as to his judicial fitness or integrity or ability. There are doubtless many excellent attorneys in Congress professionally and temperamentally capable of executing the judicial power of the United States. But because of the fundamental doctrine of separation of governmental powers, they are not considered constitutionally capable of receiving or exercising the authority of the judicial branch. And so it is with Judge Jackson. Unless at some point it can fairly be said that he acquired the authority to exercise Article III power, he is as incapable of exercising it as the most able lawyer serving in the Senate.

The most striking fact about Judge Jackson's career is that the court to which he was appointed in 1937 and on which he served for nearly fifteen years was, as we have seen, considered during all of that period to be legislative in nature and incapable of receiving Article III power. The extent of his powers and functions can certainly rise

no higher than those possessed by the court to which he was appointed. In short, if a court is legislative in nature, so too are its judges.

Here Judge Jackson was never nominated by the President or confirmed by the Senate in the light of any established notion that he could constitutionally exercise Article III judicial powers. True, as the court below noted (R. 40-41), at the time of Judge Jackson's appointment to the Court of Customs and Patent Appeals in 1937, there was in force a statute providing for the assignment of judges of that court to the District Court (then known as the Supreme Court) for the District of Columbia. 28 U.S.C. §22 (1934 ed.). That statute had been enacted in 1922, prior to the rendition of the *Bakelite* decision. But by the time of the appointment of Judge Jackson in 1937, the *Bakelite* decision had given fair warning, 279 U.S. at 460, that there might well be constitutional objections to such an assignment. The most that can be said, therefore, is that the appointment was made with knowledge that Judge Jackson's possible assignment to the District Court under this statute was of questionable constitutionality.

Much more obvious is the fact that this appointment was made primarily if not exclusively on the theory that Judge Jackson would exercise the legislative powers of the Court of Customs and Patent Appeals. And during his tenure on that court he was not in fact ever assigned to the District Court. In light of the *Bakelite* opinion, in full effect during his entire tenure on the Court of Customs and Patent Appeals, any assumption that Judge Jackson somehow acquired Article III judicial powers in this period is completely misplaced.

The focal point of inquiry must accordingly shift from the period of Judge Jackson's active service on the Court of Customs and Patent Appeals to that following his re-

tirement in 1952. The problem here is highlighted by the absence of any authority for the proposition that a judge who has retired from a legislative court can somehow acquire Article III powers during the period of his retirement. It is true that a retired constitutional court judge is considered as continuing in office within the meaning of Article III, Section 1, of the Constitution so as to forbid any diminution of his retirement compensation. *Booth* v. *United States,* 291 U.S. 339. But that ruling only suggests that a retired legislative court judge continues to hold a legislative office after his retirement.

It has been said that however legislative in nature may have been Judge Jackson's status prior to 1958, the enactment of the amendment to 28 U.S.C. §211 in 1958 certainly gave him Article III status thereafter. The short answer is that the 1958 legislation is only prospective in nature. It does not purport to be retroactive in scope or to affect the constitutional status of any judge who had previously retired from the court.[36] The amendment was expressly premised on the fact, stemming from the *Bakelite* decision, that the court "*is now* constituted under section 211 of title 28, United States Code, and *is* classified as a legislative court." S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News (1958), p. 3909. The amendment was accordingly drafted in the present tense with an eye to the future. In the amendment's terminology,

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[36] Compare the overt attempt to give retroactive effect to the 1930 legislation conferring good behavior tenure on judges of the Court of Customs and Patent Appeals: "For the purposes of section 260 of the Judicial Code, as amended, (relating to the resignation and retirement of judges of courts of the United States) any service heretofore rendered by any present or former judge of such court, including service rendered prior to March 2, 1929, shall be considered as having been rendered under an appointment to hold office during good behavior." Sec. 646 of Tariff Act of June 17, 1930, c. 497, 46 Stat. 762.

"Such court *is hereby declared to be* a court established under Article III of the Constitution of the United States." No effort was made to rewrite the status of the court prior to 1958 or to say that the court from the time of its conception in 1909 was declared to be an Article III court.

In view of that background, the 1958 amendatory legislation can fairly have no impact whatever on the capacity of Judge Jackson to perform Article III functions. The prospective intent and language of the 1958 declaration confine its thrust, if any, to those judges then sitting on the Court of Customs and Patent Appeals or becoming members thereafter. Judge Jackson took with him into retirement in 1952 only those legislative powers he acquired on appointment, and the effort to add to his powers in 1958 came too late.

On the other hand, even if the 1958 amendment be viewed as a *nunc pro tunc* declaration of Article III status, the way is still not clear to investing Judge Jackson with Article III power. The uncontestable fact is that the 1958 amendment was a mere characterization of the Court's status and was not intended to change the nature or functions of the court. Yet under the ruling of the *Bakelite* case, 279 U.S. at 459, a mere legislative characterization or declaration of a tribunal's constitutional status is not controlling.

Moreover, if the 1958 legislation were somehow construed to have reconstituted the Court of Customs and Patent Appeals and to have altered its constitutional status, renomination and reconfirmation of that court's judges would be necessary before any of them could exercise their new Article III powers.[37] Just how a retired legislative court

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[37] The need for reappointing judges of a legislative court if and when the fundamental character of such a court were changed was recognized in the following colloquy on the floor of the Senate during the consideration of the bill to declare the Court of Claims

judge could be renominated and reconfirmed as a retired Article III court judge is not clear. But the need for some form of reappointment is obvious. The considerations which give rise to the nomination and confirmation of a man to perform the essentially executive functions of a legislative court are not necessarily the same as those involved where the appointee must be equipped to wield the Article III judicial powers. A man may be thought qualified to resolve difficult tariff or customs problems but not of the right background, training or temperament to deal with the problems of life, liberty and property in an Article III court. And if all active and retired legislative court judges are suddenly to be qualified to dispense Article III justice the President and the Senate should have some opportunity to re-evaluate such court personnel in that light. Otherwise the appointive powers of the President and the confirmation duties of the Senate are abdicated to the Chief Justice of the United States in the exercise of his assignment powers.

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a constitutional court (no change being made in the structure or functions of that court), 99 Cong. Rec. 8944, July 10, 1953:

> Mr. GORE: I think it resolves itself into a question of whether we do or do not reconstitute the court. If we change the fundamental character of the court, then reappointment or appointment, as the case might be, would become absolutely necessary, and the appointments would require confirmation.
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> Mr. MCCARRAN: Again the Senator and I are in agreement on that, as a moot question, because we have agreed on the House bill.
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> Mr. GORE: We shall get together on that later.

8.

Problems Raised by Giving Effect to 1958 Legislation.

Finally, any conclusion that the Court of Customs and Patent Appeals is, by virtue of the 1958 amendment, a constitutional court and that its active and retired judges may be assigned to sit on Article III courts is to open a Pandora's box of confusion and inconsistencies. It still remains true, for example, that this Court will not and cannot review any lower court determination other than that of a judicial nature. And the Court of Claims—despite its denomination by Congress as an Article III court—still retains statutory jurisdiction to render advisory opinions on bills for monetary relief of claimants referred by either house of Congress. 28 U.S.C. §§1492, 2509. At the same time, however, the constitutional concepts of "cases" and "controversies", over which the federal judicial power extends, have been held to deny Article III courts the power to give advisory opinions. See, e.g., *Muskrat* v. *United States,* 219 U.S. 346.

How, then, can the new "constitutional" or Article III status of the Court of Claims be squared with its continuing power to render advisory opinions to Congress? Is not the 1953 declaration as to the Court of Claims inoperable on this basis alone? Or are the concepts of "cases" and "controversies" to be scrapped and recognition given to the fact that Article III courts can be delegated to perform non-judicial functions?[38]

The problem and perhaps the simple answer are to be found in the discussion of Senator Gore during the debate on the 1953 declaration as to the Court of Claims (99 Cong. Rec. 8943-8944, July 10, 1953):

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[38] See Note, The Constitutional Status of the Court of Claims, 68 Harv. L. Rev. 527, 531-535 (1955).

"I refer to the basic question of whether Congress can, under the Constitution, designate the Court of Claims an article III court and still require it to exercise the special type of jurisdiction which it has conferred upon it.

"Over the years the Supreme Court has consistently followed the principle that the Federal courts, other than those for the District of Columbia, created under article III of the Constitution, can exercise only jurisdiction falling within the judicial limits set forth in article III. . . . Thus a cloud is cast upon the constitutionality of having the Court of Claims, as an article III court, exercise the principal jurisdiction which Congress has conferred upon it. . . .

"Section 2509 of title 28 of the United States Code directs the Court of Claims to render advisory opinions on cases referred to the court by the Congress. This would seem to be a function which Congress could not require of a constitutional court. No one would seriously contend that it is a judicial power in the sense of article III.

"Since the present judges of the Court of Claims have indicated that they would raise no objection to continuing to act on congressional reference cases, perhaps the problem is moot, at least temporarily. If in the future judges of the Court of Claims should refuse to act upon congressional reference cases on the grounds that they are not within the proper scope of jurisdiction of a constitutional court, *I suppose the simple remedy will be for Congress to redesignate the Court of Claims as a legislative court.*" (Emphasis added.)

The "simple remedy" thus provided by Senator Gore is most revealing as a statement of the belief that Congress

can turn the Article III status of such a court as the Court of Claims on and off like a faucet. And it epitomizes the constant threat that hangs over such a court, the threat that some day Congress may change its intention and relabel it a legislative court, with all the salary and tenure implications that such a relabeling would entail. Such is the ephemeral quality of the Congressional relabeling process.

Still another problem raised by any recognition of the effectiveness of a legislative declaration of an Article III status is one directly involving the Court of Customs and Patent Appeals. Ever since the decision in *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, this Court has recognized that the decisions of that court in patent and trademark application matters are not reviewable judicial judgments but merely instructions "by a court which is made part of the machinery of the Patent Office for administrative purposes."[39] See also *Pacific Northwest Canning Co.* v. *Skookum Packers' Assn.*, 283 U.S. 858; *McBride* v. *Teeple*, 311 U.S. 649.

But if the Court of Customs and Patent Appeals actually did acquire Article III status in 1958, its jurisdiction to consider such patent and trademark matters and to render administrative judgments thereon would be in constitutional jeopardy. Yet that court continues to resolve such non-judicial matters. And the United States, consistent with its position in the pre-1958 legislative court days, continues to oppose the grant of certiorari to review such post-1958 decisions on the ground that they are still non-judicial decisions outside the appellate jurisdiction of this

[39] While the *Postum* case involved such an administrative determination by the Court of Appeals for the District of Columbia, that court's jurisdiction over such matters was transferred in 1929 to the Court of Customs and Patent Appeals, 45 Stat. 1475, and the decision in Postum is fully applicable to the decisions of the latter court.

Court. See *Rubenfield* v. *Watson*, 362 U.S. 903; *Commissariat a L'Energie Atomique* v. *Watson*, 362 U.S. 977. And this Court has denied certiorari in those post-1958 cases, though without specifying the reasons.

Perhaps the "simple remedy" here is the one previously given by Senator Gore as to the Court of Claims—if Congress really wants the Court of Customs and Patent Appeals to continue dealing with patent and trademark cases it should relabel the court a legislative tribunal. Here, then, is the threat that must constantly hang over the judges of the Court of Customs and Patent Appeals, the threat of another relabeling statute and the possibility that Congress may once again act—as it did in 1932—to cut their salaries, or to change their tenure.

These problems, if they be such, are merely indicative of the inescapable fact that the courts which were found to be legislative in nature in the *Bakelite* and *Williams* cases continue to function and operate in the same non-Article III manner as was described in those opinions. Their legislative nature continues to the present day within their original jurisdictional bounds. Nothing has changed. Like the stripes on the tiger, the non-Article III characteristics remain evident despite the Congressional name-changing action.

Enough has been said to indicate the dangers of such a facile legislative labeling process in dealing with the serious constitutional distinctions between legislative and Article III courts. Those are distinctions which only this Court can ultimately determine and resolve. And its decisions should remain final by virtue of its supreme power to interpret and apply the Constitution.

No reason is apparent why this Court's decisions in *Bakelite* and *Williams* should not be respected as to the

still unchanged status of the Court of Customs and Patent Appeals.

9.

Miscellaneous Considerations.

(A) *Petitioner's standing to raise the constitutional issue.* No real question exists as to the standing of the petitioner, as a person convicted of a felony in a trial presided over by Judge Jackson, to raise the issue as to the judge's constitutional capacity to sit and to render judgment against him. As an inhabitant of the District of Columbia under criminal indictment, he was entitled to be tried, in accordance with the Congressional scheme, before a court and a judge fully vested with the judicial power conferred by Article III of the Constitution. *O'Donoghue* v. *United States,* 289 U.S. 516, 540; *Callan* v. *Wilson,* 127 U.S. 540, 550. And if the judge did indeed lack warrant to sit, the trial was without due process of law. See *Donegan* v. *Dyson,* 269 U.S. 49, 54-5.

(B) *Petitioner's right to raise such a constitutional and jurisdictional issue on appeal.* Nor can there be any serious question of petitioner's right, at this appellate stage, to question Judge Jackson's constitutional authority, the issue not having been raised at the trial court level. The conclusive fact is that this issue is not only constitutional but jurisdictional and hence is open to question and to adjudication at any time, even by this Court *sua sponte.*[40] As Mr. Justice Frankfurter noted in his opinion last term in the instant case, 366 U.S. at 713, petitioner here "raises a jurisdictional question, *viz.,* whether he could constitu-

[40] The right to raise jurisdictional issues on appeal for the first time is too well settled to require extensive citation of authority. See e.g., *McGrath* v. *Kristensen,* 340 U.S. 162, 167; *Gainesville* v. *Brown-Crummer Inv. Co.,* 277 U.S. 54, 59.

tionally be tried by a court presided over by a retired judge of the Court of Customs and Patent Appeals." In other words, petitioner here is relying upon the fact that Congress has called upon the District Court to exercise its Article III power to deal with this prosecution. In this situation, the words of this Court in *Williams* v. *United States,* 289 U.S. 553, 578, become pertinent:

> "... where a controversy is of such a character as to require the exercise of the judicial power *defined by Art. 3,* jurisdiction thereof can be conferred only on courts established in virtue of that article, and that Congress is without power to vest *that* judicial power in any other judicial tribunal, or, of course, in an executive officer, or administrative or executive board, since, to repeat the language of Chief Justice Marshall in American Ins. Co. v. Canter, 1 Pet. 511, 'they are incapable of receiving it.'"

(C) *The inapplicability of the de facto doctrine.* As developed more fully in petitioner's reply brief in the Supreme Court last term (pp. 10-16), the *de facto* doctrine constitutes no defense to the challenge to Judge Jackson's capacity to sit in this case. The issue is solely one of his *constitutional authority* to act and to preside over a criminal proceeding of an Article III nature. And where there is this type of allegation, that a constitutional or statutory provision makes a judge incompetent to sit, the courts have uniformly rejected the *de facto* doctrine. See *American Construction Co.* v. *Jacksonville Railway,* 148 U.S. 372, 387; *Frad* v. *Kelly,* 302 U.S. 312, 316; *United States* v. *American-Foreign Steamship Corp.,* 363 U.S. 685, 691; *Watson* v. *Payne,* 94 Vt. 299, 301; *Norton* v. *Shelby County,* 118 U.S. 425, 441.

(D) *The impact on past decisions.* The fear has been expressed by some that, if the 1960 assignment of Judge Jackson to sit on the District Court below is found to lack constitutional sanction, a veritable crisis might occur in the administration of justice. That crisis is said to arise out of the multitude of judgments, both civil and criminal, rendered by Judge Jackson in the course of almost continual assignments to the District Court for the past few years. If all those judgments are to be considered void, a most difficult situation is said to present itself.

But a valid constitutional claim is not to be denied simply because drastic consequences may ensue. Cf. *Brown* v. *Board of Education,* 347 U.S. 483. More importantly, however, this Court is not without judicial resources to accommodate constitutional doctrines with the practical administration of justice. The scope and limits of any constitutional doctrine defined by this Court are matters to be determined with discretion and in light of all relevant factors. Adjudication, Mr. Justice Frankfurter has said, "is not a mechanical exercise nor does it compel 'either/or' determinations." *Griffin* v. *Illinois,* 351 U.S. 12, 26 (concurring opinion).

This is not the occasion to define the retroactive scope of a decision invalidating Judge Jackson's assignment. It is enough that the constitutional, jurisdictional issue has been raised in a direct appeal from petitioner's conviction so as to call forth an adjudication as to the substance of that issue. Whether such a claim, involving as it does the capacity of an individual judge rather than the power of the court to which he is assigned, may be recognized in a collateral proceeding need not here be determined. See *Donegan* v. *Dyson,* 269 U.S. 49, 54-5.[41] Nor is deci-

[41] In the *Donegan* case, the petitioner had been convicted in the federal district court in Florida, presided over by Circuit Judge Julian W. Mack. Judge Mack had been assigned to service on that

sion here necessary as to whether the principles of res judicata should be applied to such an issue which might have been but was not raised in the original proceedings. Cf. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 403.

Enough has been said, however, to justify the invalidation of the assignment as respects petitioner's trial. That alone is all that is involved at this time. Congress has exceeded the constitutional limitations in authorizing this assignment and "this Court should not good-naturedly ignore such a transgression of congressional powers." Opinion of Mr. Justice Frankfurter in *National Insurance Co.* v. *Tidewater Co.,* 337 U.S. 582, 655. Petitioner's trial in such circumstances constituted a denial of due process of law.

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court by a designation signed by Chief Justice Taft. Following affirmance of his conviction, petitioner filed a habeas corpus petition, alleging that Judge Mack had no power or jurisdiction to act as a district judge since the Commerce Court to which he had been appointed had been abolished. Chief Justice Taft, who had made the assignment, wrote the opinion for this Court rejecting that contention on its merits. The opinion expressly stated (pp. 54-5):

> "We thus do not think it necessary to consider whether even if the designation had not been valid, the sitting judge should be regarded as a judge *de facto* whose authority could not be questioned in a collateral attack, like proceeding in habeas corpus.
>
> "No question has been made whether the appeal really involves the construction or application of the Federal Constitution, such that if the construction contended for were correct and the judge were sitting without warrant, the trial would be without due process of law. We have assumed that for purposes of the decision and also that the question could be raised on habeas corpus."

Conclusion

For the foregoing reasons, the judgment below should be reversed and the case remanded for a new trial before a judge capable of receiving and exercising Article III judicial power.

Respectfully submitted,

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